In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 195

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN DAVID PROVOO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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1. Appellee seeks to avoid plenary review of the question presented on this appeal by charging the Government, in his motion to affirm, with bad faith in its original choice of the Southern District of New York as the venue of appellee's trial (M.A. 12-16, 21-24).[1] As pointed out in our jurisdictional statement (J.S. 13, 20), the court below, in dismiss-

[1] References to appellee's motion to affirm are indicated by "M.A."; references to the Government's jurisdictional statement by "J.S."; and references to the District Court's opinion, which is set forth in Appendix A of the jurisdictional statement, by "Op. J.S. App. A."

ing the indictment, expressly refrained from accepting this contention made by appellee. Thus, appellee asks this Court summarily to affirm the judgment below, without the benefit of briefs on the merits or oral argument, on the basis of a factual theory he unsuccessfully urged in the District Court and as to which that court made no fact findings in his favor.

a. The court below held that any question as to good or bad faith was irrelevant in determining whether appellee had been denied his right to have a speedy and fair trial, since a good-faith error necessitating a retrial would produce the identical degree of harm, prejudice and delay to an accused as if the mistake had been made intentionally and in bad faith (Op. J.S. App. A 66-67). It was enough, said that court, that the error was the result of "a deliberate choice for a supposed advantage" *(ibid.)*.

As we have already pointed out (J.S. 15-16), every retrial in a criminal case involves delay, expense, and some degree of prejudice to an accused, all of which could have been entirely avoided had the mistake, which caused the reversal of the first conviction, not been made by the trial judge or prosecutor. Many such mistakes are, as here, the result of a "deliberate choice" made by the prosecution "for a supposed advantage" in the belief that the choice is legally permissible and is in the interests of public justice. However, the resulting delays, following a reversal on appeal, have not heretofore been held to involve a denial of the constitu-

tional guarantees of a fair and speedy trial, or to insulate an accused from all further prosecution.

In the instant case, appellee's first treason conviction was reversed when the Court of Appeals for the Second Circuit concluded that two errors had been committed. One error was in the prosecution's initial choice of venue; the other was in the scope of cross-examination conducted by the prosecution. Both of the challenged matters were the result of a "deliberate choice for a supposed advantage" made by conscientious law enforcement officers, and both were sustained as proper by the trial judge. They were only held to be erroneous on appeal after delays which were found to be principally "the law's delays" (Op. J.S. App. A 64). Either error standing alone would have caused identical delay and damage to appellee. Such errors are inevitable under our system of law. Neither as a matter of constitutional right nor of wise judicial administration should the occurrence of such errors operate to free an accused from all further prosecution.

The contrary holding of the court below, attributing to the venue error a deprivation of appellee's right to a fair and speedy trial, is, we submit, patently erroneous, both as a general proposition and as applied to the facts of this case. Furthermore, it is novel and far-reaching in its implications in the effective administration of criminal justice, and, *a fortiori*, cannot be affirmed summarily as presenting no substantial question.

b. While this Court is not the proper forum in

which to litigate a complex factual issue which the lower court held to be legally irrelevant and on which it made no findings, a review of the record will disclose that appellee's charge of bad faith is wholly unwarranted. Government Exhibits 9 and 10, and Defendant's Exhibits 12-22 are the relevant contemporaneous Army and Justice Department documents, and it is from these that appellee principally seeks to infer bad faith (M.A. 22). Not only do they not sustain appellee's contentions, but they affirmatively show the good faith and belief of all concerned that under the venue provisions of 18 U.S.C. 3238, appellee would be "found" wherever he was first arrested on the treason charges, that New York was a more desirable place for trial than Maryland, and that the Army could properly discharge appellee in New York.[2]

2. Appellee suggests (M.A. 29-30) that the Government, in pointing out that there is no statute of limitations for the crime of treason (J.S. 19), is in effect contending that "constitutional guaranties should not apply in cases of treason" (M.A. 30). Appellee misreads the Government's argument. Our point was merely this: The fact that Congress has specifically declared that an indictment for an

[2] In his attempt to prove bad faith, appellee also quotes out of context a sentence from this Court's opinion in *Ex parte Bollman*, 4 Cranch 75, 136 (M.A. 24). The alleged treason in that case was not committed overseas, as in this case, but in a federal judicial district in this country which would have had exclusive jurisdiction of the crime. The venue statute was mentioned by the Court in its opinion, but was declared to have no relevance since the alleged offense was committed in this country (4 Cranch at 136).

offense punishable by death, such as treason, "may be found at any time without limitation", 18 U.S.C. 3281, indicates that an accused cannot be rendered immune from prosecution for such offenses by reason of the lapse of time, thus emphasizing the erroneousness of the decision below. We had previously shown (J.S. 15-19) that the constitutional right to a speedy trial is one which acquires relevance only after a formal complaint has been lodged against the accused. See especially *D'Aquino* v. *United States*, 192 F. 2d 338, 350 (C.A. 9), certiorari denied, 343 U.S. 935.

3. Appellee also argues that it would be unjust to permit him to be prosecuted at this time for acts of treason committed between 1942 and 1945 because Army authorities, following an investigation of a single phase of his alleged treasonable activities—broadcasting for the enemy (see J.S. 5, 6-7)—finally released him without the preferment of formal charges (M.A. 32). However, the acts of treason for which the Government seeks to try him now include five overt acts not involved in the Army investigation (see J.S. 5). Furthermore, even so far as his broadcasting activities are concerned, what appellee's argument comes to is that the dropping of charges because an investigation fails to disclose sufficient evidence on which to press them should immunize the person investigated from future prosecution based on sufficient evidence, which in the meantime has been obtained. The contention is manifestly untenable, and has no more relevance now than when appellee was originally indicted in 1949.

what decision is. Will have to go ahead and explore as quickly as I can. If he is discharged in New York it would involve taking him from Second Army Area to First Army and releasing him there and give him transportation to his place of induction.

Mr. Story: Yes. I don't know what the case was in the Monti case. Monti entered the service in Missouri, was tried in the Eastern District of New York.

Col. Miller: Was he brought back from overseas?

Mr. Story: No. Was brought home after re-enlistment. In Army after he got back here, was discharged in New York.

Are you familiar with Section 8 Board? How long to get action?

Col. Miller: It does not involve too much time. Fort Meade has to have Board of officers, under 615, 368, habits and traits of character undesirable. Board meets and considers evidence and reaches its conclusion. There is usually a psychiatric examination.

Mr. Story: If the Army takes action under Section 8, no reason why they would have to rush things?

Col. Miller: Some of the generals want it expedited. I think that General Gerow has some idea that he is in an untenable position. I can ask Col. Sargent what his estimate is of the time element.

Mr. Story: If this is arranged where he can be discharged in New York, we would like to know the exact time when the Army will release him so we can pick him up and get jurisdiction.

Col. Miller: OK.

CONCLUSION

It is respectfully submitted that the motion to affirm should be denied, and that probable jurisdiction should be noted.

SIMON E. SOBELOFF,
Solicitor General.

WILLIAM F. TOMPKINS,
Assistant Attorney General.

GRAY THORON,
Assistant to the Solicitor General.

PHILIP R. MONAHAN,
GEORGE ELIAS, JR.,
ERNEST MCRAE,
Attorneys.

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